

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

FILED

MAR 31 2003

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS

JOHN E. PENNY,

Plaintiff,

v.

JoANNE B. BARNHART,
Commissioner of the Social
Security Administration,

Defendant.

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CIVIL ACTION NO.

SA-02-CA-0075 FB

MEMORANDUM ORDER, DECISION AND JUDGMENT
GRANTING PLAINTIFF'S ALTERNATIVE REQUEST FOR REMAND

I. Introduction

Plaintiff/Claimant, John E. Penny, through his motion for summary judgment and supporting brief, challenges the administrative denial of his application for Title II disability insurance benefits (DIB) rendered on November 27, 2001.¹ Plaintiff argues that because the ALJ's decision, adopted by the Commissioner of the Social Security Administration as its final decision in the case, was not supported by substantial evidence of record and did not comport with relevant legal standards, the decision should be reversed and the court should award him benefits. Alternatively, plaintiff requests the case be remanded to the Commissioner for proper development.

Plaintiff's request for judicial review of the Commissioner's final decision is brought pursuant to the Social Security Act ("the Act"), 42 U.S.C. § 405(g) and 1383(c)(3). In reviewing

¹ Docket Entries 10 and 11.

the merits of this case, the Court has considered plaintiff's motion and supporting brief, the Commissioner's brief in support of her decision denying plaintiff benefits under the Act,² the plaintiff's reply,³ as well as the administrative proceedings and the applicable law. This Court is of the opinion plaintiff's alternative request for remand should be **GRANTED** because the Commissioner's decision is not supported by substantial evidence.

II. Factual Background

The main issue in this case is whether the adverse side-effects from prescribed medications for plaintiff's HIV condition, render him totally incapacitated and unable to work. The record indicates that on October 23, 1994, during a physical examination conducted as part of his retirement from the military, plaintiff first discovered he was HIV positive.⁴ From the time he was first diagnosed, plaintiff has followed an aggressive combination of medication treatments in order to keep his condition under control.⁵ While he has succeeded at controlling the progression of his disease, there is no question plaintiff has suffered significant adverse side-effects from his prescribed medications.

According to plaintiff's testimony at the hearing (hereinafter "hearing testimony") and evidence of record, plaintiff has consistently complained of suffering from chronic diarrhea, as well as persistent nausea and vomiting, migraine headaches, extreme fatigue, body aches, and even

² Docket Entry 13.

³ Docket Entry 16.

⁴ Administrative Transcript ("Transcript," at 285).

⁵ Docket Entry 11, at 4-5 (and citations to Transcript).

depression.⁶ During the administrative hearing held on May 9, 2000, plaintiff stated he experienced daily bouts of diarrhea, feels nauseated at least 20 days out of a month (or two thirds of the time, as he also put it), gets migraine headaches at least 5 times per month, has body aches a couple of times per month and suffers from extreme fatigue (*i.e.*, 4 to 5 times per month), which at times causes him to stay in bed all day.⁷ Plaintiff also testified that these symptoms, which he often experiences in combination, require him to frequently lay down during the day.⁸ Plaintiff testified he takes late afternoon naps on a daily basis.⁹ He testified his depression sometimes affects his daily activities.¹⁰

In terms of his daily activities, plaintiff testified he could perform a limited amount of light housework, depending on how he feels on that particular day, run errands only when necessary, drive a vehicle on occasion, and is able to take care of his personal hygiene and/or needs. He also testified that on occasion he visits with friends outside his home, but he spends most of his days watching television.¹¹ Plaintiff's testimony of the limited extent of his daily activities is consistent with the questionnaire he completed on May 2, 1999, in support of his claim for benefits.¹²

⁶ Transcript, at 287-90, and 147, 150, 163, 185, 203-06.

⁷ Id. at 287-92.

⁸ Id. at 291.

⁹ Id.

¹⁰ Id.

¹¹ Id. at 282.

¹² Id. at 77-81.

Plaintiff maintains that because of his symptoms, which he attributes to his medication regimen and HIV condition, he was forced to resign from his most recent part-time job as a telemarketer for a women's apparel store on February 15, 1999.¹³ Plaintiff stated the reason he resigned from his job was because he was missing too many days due to his symptoms and was unable to meet his sales production quotas.¹⁴ There is also evidence plaintiff compromised his HIV treatment by voluntarily discontinuing use of a prescribed medication because it caused him abdominal pain and nausea.¹⁵ While plaintiff's treating physician, Dr. Walter, instituted a few alternative measures to relieve plaintiff's side-effects from his prescribed treatment, she was nonetheless concerned about the toll these symptoms or side-effects were having on the plaintiff's quality of life and ability to function.¹⁶ Indeed, on August 17, 1999, Dr. Walter stated that plaintiff's symptoms, caused by his medical treatment and/or HIV status, significantly limited his daily activities, including his ability to function in a work environment.¹⁷

Plaintiff was 44 years old at the time of the administrative hearing.¹⁸ In terms of his educational background, plaintiff testified he graduated from high school and completed two years of college.¹⁹ His vocational background consists of 21 years of active military service with the

¹³ Id. at 286-87.

¹⁴ Id.

¹⁵ Id. at 150, 159, 163, 185,

¹⁶ Id. at 151.

¹⁷ Id. at 147.

¹⁸ Id. at 18 (Finding no. 7).

¹⁹ Id. at 285.

United States Air Force, working mostly in personnel matters. At the time he retired from the service in 1994, his position was that of personnel clerk.²⁰ According to plaintiff's hearing testimony, he took a year off after his retirement and then began working as a part-time telemarketer for a women's apparel store. He worked in that capacity from February of 1996 through February of 1999.²¹ The Court also notes plaintiff has been able to hold only part-time employment since being diagnosed with HIV and beginning treatment for it.

The Administrative Law Judge ("ALJ"), in an opinion authored on September 7, 2000, found plaintiff not disabled. The ALJ's analysis, however, focused on the success of plaintiff's medical treatments in controlling his HIV, rather than on the crux of plaintiff's claim for benefits, that is, his well-documented, adverse side-effects to his prescribed medications.²² Despite plaintiff's hearing testimony concerning the significant limitations his symptoms (or side-effects) posed in his ability to perform daily activities, the ALJ concluded plaintiff's hearing testimony was not credible.²³ The ALJ's assessment of the evidence, and particularly his interpretation of the bases of plaintiff's claim for disability benefits, was erroneous and as such, not in conformance with relevant legal standards.

As discussed in detail below, the ALJ committed reversible error by not conducting a proper assessment of the adverse side-effects plaintiff experienced as a result of his prescribed medications. The ALJ was in fact required to determine whether plaintiff's side effects, namely,

²⁰ Id.

²¹ Id. at 285-86.

²² Id. at 9-19.

²³ Id. at 17-18 (Finding No. 4).

his allegations of chronic diarrhea, persistent nausea and vomiting, migraine headaches, body aches and extreme fatigue, constitute an impairment(s) affecting his ability to perform work-related functions. The ALJ erred by not considering whether these symptoms could be considered impairments under the Act which would by themselves entitle plaintiff to an award of benefits. Instead, the ALJ focused on the plaintiff's HIV status and the advances made to control the condition's progression.

Further, given the extensiveness of plaintiff's prescribed medications and aggressive combination treatments, the ALJ should have sought the testimony of a medical expert for purposes of understanding the medical effects of these prescribed medications. Alternatively, the ALJ could have requested additional documentation from plaintiff's treating physician, Dr. Walter. Instead, based on his own review of the most current medical evidence of record, the ALJ determined that plaintiff was tolerating his treatments well, and that plaintiff's testimony concerning the limiting effects of his symptoms was not credible.²⁴

In addition, while it appears the ALJ found that plaintiff was unable to return to his past relevant work as a part-time telemarketer, presumably due to plaintiff's inability to deal with stress (although not specifically stated by the ALJ in his opinion), the ALJ failed to provide an analysis of plaintiff's residual functional capacity ("RFC") or properly explain in his opinion how he reached his determination that plaintiff was able to perform a full range of light work activity.²⁵ The ALJ simply referred to the Medical-Vocational Guidelines ("the Grid Rules") in support of

²⁴ Id.

²⁵ Id. at 17-18 (Finding No. 5).

his conclusion that plaintiff retained the ability to perform a full range of light level work.²⁶ Considering that plaintiff was not claiming he met a listing criteria as provided in the regulation's Listing of Impairments, the instant case turned on whether plaintiff had the RFC for work.²⁷ The ALJ simply failed to properly substantiate his findings in that regard, and for that reason, his opinion cannot be sustained. Moreover, in light of plaintiff's allegations that his symptoms were disabling, symptoms which if credible may constitute non-exertional impairments, the ALJ's use of the Grid Rules in this case was improper and warrant reversal.²⁸ The Court is troubled by the brevity of the hearing proceedings (consisting of less than 20 pages of actual testimony from the plaintiff and lasting a little over 20 minutes) and by the total lack of medical and vocational expert testimony in the case.

III. Jurisdiction

The Court has jurisdiction under 42 U.S.C. § 405(g) and § 1383(c)(3).

IV. Administrative Proceedings

According to the record in this case, plaintiff fully exhausted his administrative remedies before filing this action in federal court. Plaintiff submitted an application for DIB benefits with a protective filing date of March 26, 1999.²⁹ In his application, plaintiff originally alleged he first became disabled in October of 1994 upon being diagnosed with HIV.³⁰ Plaintiff later amended

²⁶ Id. at 17-18 (Finding No. 10).

²⁷ See Crowley v. Apfel, 197 F.3d 194, 196 & n.2 (5th Cir. 1999).

²⁸ Id. at 199-200.

²⁹ Docket Entry 11, at 1, and Transcript, at 50 and 65.

³⁰ Id.

his onset date of disability to February 15, 1999, the date he was last employed (albeit on a part-time basis).³¹ His application was initially denied on June 24, 1999,³² and again on reconsideration on September 13, 1999.³³ In his request for reconsideration, plaintiff states the following:

I feel that I qualify for disability benefits as outlined in the Social Security rules. I have the certain number of work credits. I have a physical condition (HIV positive) which has lasted since 1994 and will result in my death. Also, the HIV positive condition does result in me doing any [sic] substantial work, even my last job. This is due to the fact that I have no idea how I'm going to feel from day to day and prevents me from holding down a job. My last job I was on failed³⁴ because of the time I was absent due to my HIV status.³⁵

Plaintiff proceeded to the next step of the administrative process by requesting a hearing before an ALJ.³⁶ The hearing took place on May 9, 2000, and plaintiff appeared represented by counsel.³⁷ Besides the brief testimony from plaintiff, no one else testified at the hearing. During her closing remarks, plaintiff's counsel described her client's claim for benefits as one involving an "episodic type of disability based on side effects of the claimant's medication."³⁸

³¹ Transcript, at 11.

³² Id. at 28.

³³ Id. at 36.

³⁴ The word used by Mr. Penny in his Request for Reconsideration at page 33 of the Transcript was cut off by the copying process. It is the Court's best guess/interpretation that he used the word "failed" here.

³⁵ Transcript, at 33.

³⁶ Id. at 40.

³⁷ Id. at 276.

³⁸ Id. at 294. As of October of 1999, plaintiff's combination therapy for his HIV status consisted of the following: Stavudine (Zerit), one tablet twice a day; Abacavir (Ziagen), one tablet twice a day; Lamivudine (Epivir), one tablet twice a day, and Efavirenz (Sustiva), one tablet three times a day. Id. at 89. He also reported taking Septra (to prevent infections), once a day, Nortriptyline (for depression), once a day, Hydrochlorothiazide

The ALJ rendered a finding of no disability on September 7, 2000. Through his own interpretation of the medical evidence of record (with no assistance from a medical expert) and plaintiff's testimony concerning his daily activities, the ALJ found that plaintiff's symptoms of depression and anxiety disorder were not severe impairments.³⁹ Indeed, the only severe impairment found by the ALJ was plaintiff's HIV syndrome.⁴⁰

The ALJ also noted that plaintiff had recently reported to his physicians that his HIV treatment was tolerable, with no significant symptoms noted.⁴¹ The ALJ further stated that plaintiff's testimony concerning disabling symptoms was not credible because it was inconsistent with the medical evidence of record which established that he retained the RFC to perform a full range of light work.⁴² It is not clear from the ALJ's opinion how he determined that plaintiff was no longer able to perform his prior relevant work as a telemarketer or as a personnel clerk.⁴³ Further, the record is devoid of any functional assessment made of plaintiff, from his physicians or even from a consultative examiner, which would have supported the ALJ's conclusion that plaintiff could perform the full spectrum of light work. Having found no severe symptoms and/or

and Lisinopril (Zestril), for his high blood pressure, once a day, Prochlorperazine maleate (for nausea and vomiting), when needed up to six times a day. In addition to these prescribed medications, plaintiff reported taking over-the-counter products such as Zantac (for heart burn), Benadryl (for sinuses and to help him sleep), Loperamide (for loose stool), when needed up to eight times a day, Tylenol PM (to help him sleep) and Advil (for headaches). Id. at 89-90.

³⁹ Id. at 11.

⁴⁰ Id. at 18 (Finding No. 3).

⁴¹ Id. at 16.

⁴² Id. at 18 (Finding No. 4).

⁴³ Id. at 17 and 285-86.

mental impairments, the ALJ applied the Grid Rules and concluded that plaintiff was not under a “‘disability’ as defined in [the Act], at any time through the date of this decision.”⁴⁴

Following the ALJ’s finding of no disability, plaintiff requested review of the ALJ’s decision to the Appeals Council on September 12, 2000.⁴⁵ The Appeals Council, on November 27, 2001, denied plaintiff’s request for review concluding that the ALJ’s decision was not erroneous and adopted it as the final decision of the Commissioner.⁴⁶ This lawsuit ensued.⁴⁷

V. Issue Presented

Whether substantial evidence and relevant legal standards support the Commissioner’s decision that plaintiff was not disabled within the meaning of the Act, from February 15, 1999, his alleged onset date of disability, through the September 7, 2000 ALJ’s decision?

VI. Analysis

A. *Standard of Review*

In reviewing the Commissioner’s decision denying disability insurance benefits, the court is limited to a determination of whether substantial evidence supports the decision and whether the Commissioner applied the proper legal standards in evaluating the evidence.⁴⁸ “Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a

⁴⁴ Id. at 19 (Finding no. 11).

⁴⁵ Id. at 5.

⁴⁶ Id. at 3-4.

⁴⁷ Docket Entry 1.

⁴⁸ Martinez v. Chater, 64 F.3d 172, 173 (5th Cir. 1995); 42 U.S.C. §§ 405(g), 1383(c)(3) (2002).

reasonable mind might accept as adequate to support a conclusion.”⁴⁹ Substantial evidence “must do more than create a suspicion of the existence of the fact to be established, but ‘no substantial evidence’ will be found only where there is a ‘conspicuous absence of credible choices’ or ‘no contrary medical evidence.’”⁵⁰

If the Commissioner’s findings are supported by substantial evidence, then they are conclusive and must be affirmed.⁵¹ In reviewing the Commissioner’s findings, the court must carefully examine the entire record, but refrain from re-weighing the evidence or substituting its judgment for that of the Commissioner.⁵² “Conflicts in the evidence and credibility assessments are for the Commissioner and not for the courts to resolve.”⁵³ Four elements of proof are weighed by the courts in determining if substantial evidence supports the Commissioner’s determination: (1) objective medical facts, (2) diagnoses and opinions of treating and examining physicians, (3) the claimant’s subjective evidence of pain and disability, and (4) the claimant’s age, education and work experience.⁵⁴

1. Entitlements to Benefits

Every individual who is insured for disability insurance benefits, has not reached retirement age, has filed an application for benefits, and is under a disability is entitled to receive

⁴⁹ Villa v. Sullivan, 895 F.2d 1019, 1021 (5th Cir. 1990) (quoting Hames v. Heckler, 707 F.2d 162, 164 (5th Cir. 1983)).

⁵⁰ Abshire v. Bowen, 848 F.2d 638, 640 (5th Cir. 1988) (quoting Hames, 707 F.2d at 164).

⁵¹ Martinez, 64 F.3d at 173.

⁵² Ripley v. Chater, 67 F.3d 552, 555 (5th Cir. 1995); Villa, 895 F.2d at 1021 (“The court is not to reweigh the evidence, try the issues de novo, or substitute its judgment for that of the Commissioner.”).

⁵³ Martinez, 64 F.3d at 174.

⁵⁴ Id.

disability insurance benefits.⁵⁵ The term “disabled” or “disability” means the inability to “engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.”⁵⁶ A claimant shall be determined to be disabled only if his physical or mental impairment or impairments are so severe that he is unable to not only do his previous work, but cannot, considering his age, education, and work experience, participate in any other kind of substantial gainful work which exists in significant numbers in the national economy, regardless of whether such work exists in the area in which he lives, whether a specific job vacancy exists, or whether he would be hired if he applied for work.⁵⁷

2. Evaluation Process and Burden of Proof

Regulations set forth by the Commissioner prescribe that disability claims are to be evaluated according to a five-step process.⁵⁸ A finding that a claimant is disabled or not disabled at any point in the process is conclusive and terminates the Commissioner’s analysis.⁵⁹

The first step involves determining whether the claimant is currently engaged in substantial gainful activity.⁶⁰ If so, the claimant will be found not disabled regardless of his medical condition

⁵⁵ 42 U.S.C. § 423(a)(1).

⁵⁶ Id. § 1382c(a)(3)(A).

⁵⁷ Id. § 1382c(a)(3)(B).

⁵⁸ 20 C.F.R. §§ 404.1520 and 416.920 (2002).

⁵⁹ Leggett v. Chater, 67 F.3d 558, 564 (5th Cir. 1995).

⁶⁰ 20 C.F.R. §§ 404.1520 and 416.920.

or his age, education, or work experience.⁶¹ The second step involves determining whether the claimant's impairment is severe.⁶² If it is not severe, the claimant is deemed not disabled.⁶³ In the third step, the Commissioner compares the severe impairment with those on a list of specific impairments.⁶⁴ If it meets or equals a listed impairment, the claimant is deemed disabled without considering his age, education, or work experience.⁶⁵ If the impairment is not on the list, the Commissioner, in the fourth step, reviews the claimant's RFC and the demands of his past work.⁶⁶ If he is still able to do his past work, he is not disabled.⁶⁷ If he cannot perform his past work, the Commissioner moves to the fifth and final step of evaluating the claimant's ability, given his residual capacities, age, education, and work experience, to do other work.⁶⁸ If he cannot do other work, he will be found disabled. The claimant bears the burden of proof at the first four steps of the sequential analysis.⁶⁹ Once he has shown that he is unable to perform his previous work, the burden shifts to the Commissioner to show that there is other substantial gainful employment available that the claimant is not only physically able to perform, but also, taking into account his

⁶¹ Id.

⁶² Id.

⁶³ Id.

⁶⁴ 20 C.F.R. §§ 404.1520 and 416.920.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ Leggett, 67 F.3d at 564.

exertional and non-exertional limitations, able to maintain for a significant period of time.⁷⁰ If the Commissioner adequately points to potential alternative employment, the burden shifts back to the claimant to prove that he is unable to perform the alternative work.⁷¹ In the instant case, the ALJ made his determination of no disability at Step Five of the sequential evaluation process. That is, he found that although plaintiff was unable to return to his past relevant work as a telemarketer or personnel clerk, he nevertheless could still perform a full range of light work as provided in the Grid Rules.⁷²

B. Is the September 7, 2000 ALJ's Decision Supported by Substantial Evidence?

As his main ground for reversal, plaintiff contends the ALJ's determination that he did not suffer from any severe non-exertional limitations is not supported by substantial evidence and/or resulted from an error of law.⁷³ Specifically, plaintiff argues the ALJ erred in his credibility assessment of plaintiff's hearing testimony concerning the frequency of his symptoms, particularly his daily bouts of diarrhea and his persistent nausea and fatigue (as well as his other alleged side-effects he experiences from his prescribed HIV medications), and how they affect plaintiff's ability to work. He claims these ailments constitute severe non-exertional impairments that render him disabled.⁷⁴

⁷⁰ Watson v. Barnhart, 288 F.3d 212, 217 (5th Cir. 2002).

⁷¹ Anderson v. Sullivan, 887 F.2d 630, 632-33 (5th Cir. 1989).

⁷² Transcript, at 17-18 (Finding No. 10).

⁷³ Docket Entry 11, at 6-8. A "non-exertional" limitation is one that affects a claimant's ability to meet the non-strength demands of a job. 20 C.F.R. § 404.1569a(c)(1).

⁷⁴ Id.

The SSA regulations define the term “symptom” as “an individual’s own description of his or her physical or mental impairments.”⁷⁵ Under the regulations, an individual’s statement about his or her symptoms is not enough in itself to establish the existence of a physical or mental impairment or that the individual is disabled. The regulations describe a two-step process for evaluating symptoms, such as pain, fatigue, shortness of breath, weakness or nervousness. First, the adjudicator must consider whether there is an underlying medically determinable physical or mental impairment, *i.e.*, an impairment(s) that can be shown by medically acceptable clinical and laboratory diagnostic techniques, that could reasonably be expected to produce the individual’s pain or other symptoms.⁷⁶ There is no question that plaintiff’s HIV status meets the first prong of this test.

Second, once an underlying physical or mental impairment(s) that could reasonably be expected to produce the individual’s pain or other symptoms has been shown, the adjudicator must evaluate the intensity, persistence, and limiting effects of the individual’s symptoms to determine the extent to which the symptoms limit the individual’s ability to do basic work-activities.⁷⁷ For this purpose, the regulations further provide that whenever the individual’s statements about the intensity, persistence, or functionally limiting effects of pain or other symptoms are not substantiated by the objective evidence, the adjudicator must make a finding on the credibility of the individual’s statements based on a consideration of the entire case record.⁷⁸ This includes the

⁷⁵ SSR 96-7.

⁷⁶ Id.; see also Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996).

⁷⁷ SSR 96-7

⁷⁸ Id.

medical signs and laboratory findings, the individual's own statements about the symptoms, any statements and other information provided by the treating or examining physicians or psychologists and other persons about the symptoms and how they affect the individual, and any other relevant evidence in the case record.⁷⁹ The Court finds the ALJ's credibility assessment of plaintiff's symptoms at this step of the process was not supported by the substantial evidence of record.

The ALJ's decision relies heavily on the effectiveness of plaintiff's HIV treatment in controlling the progression of his HIV condition, not on the adverse side-effects plaintiff's prescribed treatment have on his ability to work.⁸⁰ Despite noting plaintiff's consistent complaints to his medical providers about his diarrhea and persistent nausea, the ALJ seemed satisfied with the fact plaintiff has reported some tolerance to his most recent prescribed medications, with presumably no significant symptoms reported.⁸¹ Contrary to this finding, however, is plaintiff's hearing testimony that he continues to experience daily bouts of diarrhea, feels nauseated at least 20 days out of a month (or two thirds of the time, as he also put it), gets migraine headaches at least 5 times per month, has body aches a couple of times per month and suffers from extreme fatigue (*i.e.*, 4 to 5 times per month), which at times causes him to stay in bed all day.⁸² Plaintiff also testified that these symptoms, which he often times experiences in combination, cause him to frequently lay down during the day, in addition to taking late afternoon naps on a daily basis.⁸³

⁷⁹ Id.

⁸⁰ Transcript, at 17.

⁸¹ Id. at 16-17.

⁸² Id. at 287-92.

⁸³ Id. at 291.

Plaintiff's hearing testimony is indeed consistent with the medical opinion rendered by, Dr. Walter, the physician who has treated plaintiff's HIV condition since he was first diagnosed in 1994. In a letter dated August 17, 1999, Dr. Walter states, in pertinent part:

Mr. Penny has frequent episodes of sinusitis and he has chronic diarrhea due to his HIV-1 and its treatment, despite multiple attempts to control this through medication changes. Other symptoms from his HIV-1 or from medications include fatigue and persistent nausea and intermittent vomiting. The combination of chronic diarrhea and persistent nausea significantly limit Mr. Penny's daily activity. As well, the patient suffers from depression due to his HIV-1 disease and continues to receive treatment for this. The above symptoms limit Mr. Penny's ability to function in the work environment.⁸⁴

Dr. Walter's statement is supported by her medical notes in which she reported having to frequently modify plaintiff's course of HIV treatment due to the adverse side-effects plaintiff experienced as a result of some of the prescribed medications; side-effects which, in her opinion, significantly interfere with plaintiff's quality of life.⁸⁵ In fact, Dr. Walter's records reflect that at one time plaintiff went to the extreme of compromising the efficacy of his HIV treatment by voluntarily discontinuing use of one of his HIV medications, due to the severe abdominal pain and nausea he experienced when taking the medication.⁸⁶ Dr. Walter reported having counseled plaintiff on the need to follow the prescribed regimen to control the progression of his disease.⁸⁷ It appears that after a few modifications, plaintiff was able to re-continue use of the particular medication.⁸⁸

⁸⁴ Id. at 147.

⁸⁵ Id. at 150-52 and 159.

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ Id.

The ALJ dismissed Dr. Walter's letter by stating it was misleading in that it did not accurately indicate the plaintiff's most recent viral load count (*i.e.*, the method used to determine the progression of the virus).⁸⁹ The ALJ also found the letter not credible to the extent it went to the ultimate determination of disability in this case. Further, with respect to Dr. Walter's statements concerning the limitations posed by plaintiff's symptoms, the ALJ stated that because Dr. Walter failed to provide specific limitations, her opinion was not credible.⁹⁰ Although it is true Dr. Walter did not include that information in her letter, the court questions why the ALJ did not re-contact her to seek further information prior to discounting her opinion. It is well-recognized that an ALJ has the responsibility to "develop the facts fully and fairly relating to the applicant's claim," and, if he does not meet this responsibility, his decision is not "substantially justified."⁹¹

The ALJ's duty to re-contact Dr. Walter for additional information was further reinforced by plaintiff's hearing testimony. Plaintiff specifically testified about the limiting effects his symptoms posed to his ability to perform daily activities, including work-related activities. In fact, plaintiff testified that he was compelled to resign from his previous part-time employment due to excessive absenteeism. Plaintiff further testified that because it was difficult to predict the severity of his symptoms from one day to the next, his work routine was not reliable, and he found himself unable to meet the sales production quotas required of the job. Based on this

⁸⁹ Id. at 15.

⁹⁰ Id.

⁹¹ Boyd v. Apfel, 239 F.3d 698, 708 (5th Cir. 2001) (quoting Ripley, 67 F.3d at 557); see also Newton v. Apfel, 209 F.3d 448 (5th Cir. 2000).

testimony, the Court finds that prior to assessing the credibility of plaintiff's hearing testimony on the disabling effect of his symptoms and/or adverse side-effects to his prescribed medications, it was imperative for the ALJ to re-contact Dr. Walter.

Further, because plaintiff's symptoms are associated with plaintiff's prescribed medications for his HIV condition, the SSA regulations require the ALJ to consider the "type, dosage, effectiveness, and side effects of any medication [the claimant] takes or has taken to alleviate [] pain or other symptoms."⁹² The ALJ failed to perform this analysis with any level of particularity. Therefore, the Court agrees with plaintiff's argument the ALJ should have sought medical expert testimony concerning the side-effects of plaintiff's prescribed HIV medications, particularly when taken in combination, and the extent to which any of these side-effects could have improved with regimen modifications or any other alternative treatment(s) of relief.⁹³

Moreover, although not determinative, the ALJ ignored the fact the Veteran's Administration awarded plaintiff an increased disability rating based on some of the same incapacitating symptoms he alleges in this case.⁹⁴ Further, while the ALJ also mentioned plaintiff visited the Urgent Care Clinic on February 26, 1999, with complaints of having nausea, vomiting, and diarrhea for 36 consecutive hours, he appears to have ignored the significance of this evidence when assessing plaintiff's credibility.⁹⁵ The ALJ's analysis of the evidence regarding the limitations posed by the symptoms related to plaintiff's prescribed medications is simply not

⁹² 20 C.F.R. § 404.1529(c)(3)(iv).

⁹³ Docket Entry 11, at 6-8.

⁹⁴ Transcript, at 11.

⁹⁵ Id. at 13.

supported by the substantial evidence of record and does not comport with the applicable legal standards.⁹⁶

Further, the Court relies on the Fifth Circuit's decision in Crowley v. Apfel, in which the Fifth Circuit, in remanding the case to the Commissioner for an award of benefits, found in part that plaintiff's bowel incontinence, a condition associated with plaintiff's uncontrolled diabetes, was a non-exertional impairment in itself under the Act.⁹⁷ Likewise, chronic diarrhea (and presumably, persistent nausea and vomiting as well) as alleged by the plaintiff in this case may also be considered a non-exertional impairment under the Act.⁹⁸ The ALJ failed to evaluate it as such in this case.

Plaintiff's challenge to the ALJ's assessment of the severity of his non-exertional impairments also brings into question the ALJ's exclusive reliance on the Grid Rules in reaching his decision of no disability at step five of the sequential evaluation process. When a claimant, such as plaintiff in this case, asserts that his non-exertional impairments significantly affect his RFC for work, and such assertion is supported by the substantial evidence of record, the ALJ is precluded from relying on the Grid Rules in his analysis.⁹⁹ Rather, the ALJ is required to "rely

⁹⁶ See also Hamilton v. Chater, 942 F. Supp. 1354 (D. Or. 1996) (where the district court reversed and remanded the Commissioner's decision of no disability on the basis that the ALJ's credibility assessment of plaintiff's testimony of fatigue, a symptom associated with her HIV positive status, was not supported by substantial evidence).

⁹⁷ Crowley v. Apfel, 197 F.3d 194, 198-99 (5th Cir. 1999).

⁹⁸ See e.g., Houston v. Chater, 56 F.3d 77 (10th Cir. May 31, 1995 Table of Decision, 1995 WL 324503) No. 94-7059, slip at **2, D.C. No. CV-91-191-S (chronic diarrhea as a symptom is a non-exertional impairment) (unpublished decision); Rambo v. Heckler, 728 F.2d 1583 (11th Cir. 1984); Mendoza v. Apfel, 88 F. Supp. 2d 1108 (C.D. Cal. 2000).

⁹⁹ See Selders v. Sullivan, 914 F.2d 614 (5th Cir. 1990).

upon expert vocational testimony or other similar evidence” to determine whether there existed other work in the national economy that plaintiff was capable of performing.¹⁰⁰ Because the Court concludes the ALJ’s findings with respect to plaintiff’s adverse side-effects from his medications, in particular his symptoms of chronic diarrhea and persistent nausea and vomiting, are unsupported by substantial evidence, the Court must likewise conclude that exclusive reliance on the Grid Rules in this case constitutes reversible error. In view of plaintiff’s testimony concerning his inability to maintain his most recent part-time employment due to his symptoms, vocational expert testimony was essential to properly ascertain plaintiff’s RFC and his ability to not only obtain alternative employment but to also maintain such employment.¹⁰¹

VII. Conclusion

Based on the discussion above, the Court hereby finds the Commissioner’s decision should be **REVERSED** and plaintiff’s alternative request to **REMAND** this case for a rehearing before the ALJ for further proceedings consistent with this Order, pursuant to sentence four of 42 U.S.C. § 405(g) should be **GRANTED**.¹⁰²

Therefore, **IT IS HEREBY ORDERED** that the Commissioner’s decision is **REVERSED** because it is not based on substantial evidence and is not a correct application of the relevant legal standards.¹⁰³ **IT IS FURTHER ORDERED** that plaintiff’s motion for summary judgment, or alternatively, for remand (Docket Entry 10) is **GRANTED IN PART** as to **remand** of this case.

¹⁰⁰ See Scott v. Shalala, 30 F.3d 33 (5th Cir. 1994).

¹⁰¹ See Watson v. Barnhart, 288 F.3d 212, 218 (5th Cir. 2002); Singletary v. Bowen, 798 F.2d 818 (5th Cir. 1986).

¹⁰² See Istre v. Apfel, 208 F.3d 517, 519-21 (5th Cir. 2000).

¹⁰³ To the extent the ALJ’s decision on plaintiff’s mental impairments does not comply with the severity standard enunciated by the Fifth Circuit in Stone v. Heckler, 752 F.2d 1099 (5th Cir. 1985), the Court expects that issue will be revisited on rehearing.

Accordingly, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this case is REMANDED to the Commissioner for a rehearing before the ALJ for further proceedings consistent with this Order pursuant to sentence four of 42 U.S.C. § 405(g). IT IS FURTHER ORDERED, ADJUDGED and DECREED that this case is CLOSED and any pending motions are DENIED AS MOOT.

It is so ORDERED.

SIGNED this 31st day of March, 2003.



FRED BIERY
UNITED STATES DISTRICT JUDGE